American Postal Workers Union, Local 735 (United States Postal Service) *and* Teri Adelson. Cases 17–CB–5444–P and 17–CB–5517–P

December 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 7, 2001, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

Background

As described by the judge, this case arose in the wake of the Respondent Union's grievance alleging that an employee in another craft had been assigned work in the Respondent's bargaining unit jurisdiction. The grievance was resolved by an agreement that unit employees who were on the "overtime desired" list would be compensated for the hours worked by the nonunit employee. Christine Pruitt, the Respondent's steward, chose the unit employees who would share in the payment. In order to give those chosen more money, Pruitt excluded several other unit employees, including Charging Party Teri Adelson.

Adelson filed a charge with the Board, alleging that she had been excluded from the settlement because she was not a member of the Respondent, and that her exclusion violated Section 8(b)(1)(A) of the Act. After the Regional Director issued a complaint, Adelson's charge was settled in April 2001 through a non-Board settlement agreement between the Respondent and Adelson, without objection from the Regional Director, that required the Respondent to post a notice and make an appropriate payment to Adelson. The required notice stated: "The American Postal Workers Union Local 735 recognizes and observes the rights of all employees in the Unit." On the basis of the settlement agreement, at Adelson's request, the Regional Director approved her voluntary withdrawal of the charge and dismissed the complaint.

The following month, Dave Darrough, the Respondent's president and signatory on the posted notice, discussed the settlement of Adelson's unfair labor practice charge in his monthly column in the Respondent's newsletter to its members. Darrough's column was the lead article on the newsletter's front page, and it appeared under the headline, "Want Union Benefits? Join the Union to Get Them." Darrough noted that "non-member Adelson" had initially not received any settlement money under the Respondent's settlement of the lost-work grievance. The column continued (emphasis added):

> Evidently this didn't set well with Ms. Adelson. Although she doesn't pay dues and probably never will, she certainly demands everything that dues paying members struggle for. Ms. Adelson never called the Union or made an inquiry as to why she wasn't included. She simply filed a complaint with the National Labor Relations Board alleging she had been discriminated against by the Local Union. At some point, even when you are right, litigation costs more to defend than it is worth. On the advice of our attorneys, we decided to avoid further litigation that promised to run into the thousands. I settled her complaint by paying her the amount those who received the award settlement were paid. I report this to the membership because it is true. I was cautioned that if I reported this I should look over my shoulder and not be surprised if another complaint isn't filed against me. I am never surprised at the steps a SCAB, FREE LOADER or what ever you choose to call a person who refuses to pay their fair share and take a free ride on the dues of dues paying membership. *I tell you right now, I am proud of [steward] Chris Pruitt and stand behind and support her 100%. She never intentionally did anything wrong, and I don't believe she ever will.*

Adelson filed a second 8(b)(1)(A) charge on the basis of Darrough's column. The Regional Director revoked his dismissal of the previous complaint and issued the instant consolidated complaint, alleging that the Respondent violated Section 8(b)(1)(A) by the actions both of Pruitt and of Darrough.

The judge stated in his decision that "[t]here is little question that Pruitt's decision to exclude some members of the bargaining unit from settlement of the grievance was discriminatory." In addition, the judge stated that "[b]y her actions, Pruitt clearly failed in her duty to represent fairly all unit employees." The judge also found, however, that Darrough's newsletter column neither justified setting aside the settlement agreement nor violated Section 8(b)(1)(A). As explained below, we disagree with the judge.

Analysis

The relevant legal framework is not in dispute. A Board settlement agreement "may be set aside and unfair labor practices found based on presettlement conduct (1) if there has been a failure to comply with the provisions of the settlement agreement or (2) if postsettlement unfair labor practices are committed." *Nations Rent, Inc.*, 339 NLRB No. 101, slip op. at 2 (2003) (citations omitted). This principle has been applied not only in cases involving a Board settlement, but also in cases, like this one, involving a non-Board settlement. *Donald Sullivan & Sons*, 333 NLRB 24 (2001) (non-Board settlement properly set aside where employer failed to comply with settlement terms); *Jordan Graphics*, 295 NLRB 1085, fn. 1, 1092 (1989) (non-Board settlement properly set aside where employer committed postsettlement unfair labor practices).

With respect to the first ground for setting aside a settlement agreement, the Board has found noncompliance where the charged party posted alongside of the settlement notice its own notice which tended "to minimize the effect" of the settlement notice and suggested to employees that "it does not subscribe to any of the statements expressed" in the notice. *Bangor Plastics, Inc.*, 156 NLRB 1165, 1167 (1966), enf. denied 392 F.2d 772 (6th Cir. 1967). Accord: *Bingham-Williamette Co.*, 199 NLRB 1280, 1282 (1972) (noncompliance found where notice the respondent posted next to settlement's notice "implied that the conduct it had agreed not to engage in was permissible"); *Gould, Inc.*, 260 NLRB 54, 57–58 (1982) (notices the respondent distributed to employees "so contradicted the terms of the Board's required notice as to cancel the legitimate purpose of the required notice and amount to noncompliance"). See *Teamsters Local 372 (Detroit Newspapers)*, 323 NLRB 278, 279–280 (1997) (union statements in strike newspaper "tend[ed] to undermine the stipulated notice to employees" and "are clearly grounds for disapproval of the settlement under prior Board decisions").

Relying on this line of case law, the General Counsel contends, inter alia, that the Respondent failed to comply with the non-Board settlement agreement by virtue of its comments in the newsletter article quoted above which served to completely undermine the assurances in the notice that the Respondent would respect the rights of all unit employees. For the reasons set forth below, we agree with the General Counsel.

In this case, the notice provision of the non-Board settlement agreement required the Respondent to post a public assurance that it would recognize and observe the rights of all employees in the unit, members and nonmembers alike. However, in direct contradiction of that posted notice, Darrough's column—entitled "Want Union Benefits? Join the Union to Get Them"—communicated a clear disregard for the rights of nonmember employees. In stating categorically that he was "proud" of Pruitt, that he "stand[s] behind and support[s] her 100%," Darrough indicated that notwithstanding the settlement he applauded what Pruitt had done: i.e., conduct alleged to be discriminatory and unlawful.

Darrough also clearly expressed his contempt for Adelson's efforts to assert her protected rights as a nonmember. Had the column merely expressed Darrough's disapproval of "free loaders," it might have been insufficient to undermine the settlement. Employers and unions have a right under Section 8(c) to express their opinions in a noncoercive manner. However, Darrough's comments exceeded Section 8(c)'s zone of protection by suggesting that it is permissible, indeed laudable, for a union to discriminate against nonmembers. For this reason, contrary to our dissenting colleague's view, Darrough's comments were not privileged.

Our colleague would have us believe that the Union was complaining about Adelson's asserted failure to pay dues to the Union, as distinguished from Adelson's nonmembership in the Union. The facts are to the contrary. The Union was not simply complaining about Adelson's failure to pay dues; it was affirmatively praising its steward for discriminating against Adelson because she was not a dues-paying member. It is well-established that a union cannot discriminate against employees for nonmembership or failure to pay dues.[1] The Union's message indicates that it was permissible, even laudable, to do so. That message was improper.

It is true, as the judge recognized, that the Respondent had complied with the literal terms of the non-Board settlement by paying Adelson the amount she was due and posting the agreed notice. Indeed, the posted notice was an important part of the remedy in this case and presumably played a role in the Regional Director's decision not to object to the settlement. Darrough's column, by indicating that Adelson or other nonmembers would be treated in the same manner in the future, effectively negated the posted notice's assurance of nondiscrimination.[2] In these circumstances, the General Counsel acted

[1] There is no evidence that there is a union-security clause.

[2] Citing *Littler Diecasting Corp.*, 334 NLRB 707, 710–711 (2001), and *Deister Concentrator Co.*, 253 NLRB 358, 359 (1980), the dissent argues that the settlement should not be set aside because the Respondent has complied with the posting and backpay requirements of the settlement. We disagree. In the cases cited by the dissent, the Board emphasized that the respondents had taken "significant remedial action in addition to the notice-posting," which had the effect of illustrating "in a manner meaningful to employees that it is abiding by the settlement agreement." *Littler Diecasting*, 334 NLRB at 710 (respondent

within his discretion in setting aside the settlement agreement and in issuing a consolidated complaint alleging violations of Section 8(b)(1)(A) both before and after the execution of the settlement.

In further response to our colleague, we posit the following case. An employer's supervisor refuses to grant monetary benefits to an employee because of the employee's membership in a union. The employee files a charge against the employer, and the General Counsel issues a complaint. The case settles on a non-Board basis. The settlement includes the posting of a notice. Shortly thereafter, the employer posts a notice which excoriates membership in the union and says that the employer "is proud of" the supervisor's conduct and "stands behind and supports the supervisor 100%." The General Counsel asserts that this conduct undermines the settlement and is unlawful. In our view, the General Counsel would be correct, and we reach the same result in the instant case.

Our colleague argues that Darrough's column was not contemporaneous with the posting of the notice required by the settlement; that the column was mailed rather than posted next to the notice; or that it was mailed only to union members. In our view, none of these features negated the column's substance or potential impact on employees. The column appeared either during or immediately after the posting period. Rather than simply being posted, it was delivered to every member of the Union. Further, the column was not kept from nonmembers. Nonmember Adelson herself read the column shortly after its publication.

Our dissenting colleague further states that "there is little point in resuming this litigation" because the Union complied with the posting requirement. However, having found that Darrough's column undermined the posted notice, a second notice which clearly tells the employees, with the U.S. Government's imprimatur, that their rights will be respected is precisely what is needed.

For these reasons, we approve the General Counsel's revocation of his dismissal of his initial complaint relating to the Respondent's withholding of lost-time pay from Adelson, and his issuance of the consolidated complaint alleging that that action and the publication of Darrough's column both violated Section 8(b)(1)(A). We will therefore remand the case to the judge for a determination on the merits of both allegations, including, if necessary, reopening of the record to obtain evidence required to decide the case.[3]

ORDER

The National Labor Relations Board orders that the issues of whether the Respondent violated Section 8(b)(1)(A) of the Act by excluding Teri Adelson from the settlement of the Respondent's underlying lost-work grievance, or by publishing the May 2001 newsletter column by Dave Darrough addressing the settlement of that grievance and the settlement of Adelson's unfair labor practice charge relating to that grievance, are remanded to the administrative law judge for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. December 31, 2003

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS

MEMBER LIEBMAN, dissenting.

The Respondent Union here complied with the non-Board settlement now at issue: it paid the backpay agreed to, and it posted the required notice. At the same time, Union President Dave Darrough defended the Union's underlying conduct and inveighed against the Charging Party and other nonmembers—in a newsletter directed only to union members. Despite its harsh words, Darrough's column was protected by Section 7 of the Act. Setting aside the settlement based on Darrough's column

reinstated preexisting work rules and policies "directly touch[ing] all employees in the bargaining unit on a daily basis"); *Deister Concentrator*, 253 NLRB at 359 and fn. 5 (respondent, inter alia, paid more than $25,000 in backpay to alleged discriminatees, reinstated nine employees, and recalled others by seniority from the preferential hiring list). Comparable remedial action was not taken by the Respondent here. Aside from posting the notice, the only affirmative action the Respondent undertook was the making of a monetary payment to a single employee (the Charging Party). Under these circumstances, the notice-posting requirement of the settlement is of paramount importance because the notice is the only effective means of impressing on all bargaining unit employees that the Respondent was abiding by the settlement's terms and honoring their statutory rights. As discussed above, however, Darrough's column undermined the assurances in the notice. Therefore, a finding of noncompliance is warranted under the *Bangor Plastics* line of precedent.

[3] Because we are remanding the case, we express no view on the merits of either allegation.

risks chilling protected speech, but without serving a compelling statutory interest. Little is served in resuming the litigation, given the Union's steps to comply with the settlement. Accordingly, I dissent.

This is a close case. It is true that several of Darrough's comments that my colleagues find unacceptable—"Want Union Benefits? Join the Union to Get Them," and "I am proud of Chris Pruitt and stand behind and support her 100%"—can be read to imply a strong desire to limit the benefits of union representation to union members. However, the primary theme of Darrough's column was the perceived unfairness of the Union's obligation to represent employees commonly referred to as "free riders"[1]—or, in Darrough's characterization, an employee who "doesn't pay dues and probably never will" but at the same time "demands everything that dues paying members struggle for." In this light, the column's headline was not a threat that "union benefits" would go only to those employees who "joined the Union to get them," but rather a statement that, as a matter of principle, an employee who intends to accept union benefits ought to join the Union and share in the financial burden of securing them.

While the Act requires a union to represent all employees in the bargaining unit without discrimination, members and nonmembers alike, it does not bar the union from expressing, at least to its members, its opinion as to that obligation. Darrough's reference to Charging Party Adelson as "a SCAB, FREE LOADER or whatever you choose to call a person who refuses to pay their fair share and take a free ride on the dues of dues paying membership," while certainly antagonistic, is protected under established law and federal policy that "favor uninhibited, robust, and wide-open debate in labor disputes." *Old Dominion Branch No. 496, National Assn of Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974).[2] Similarly, union officials had a clear right under Section 7, consistent with their general fiduciary obligations, to explain to union members how and why the Union had expended their dues money to settle litigation challenging the Union's conduct as unlawful.

In this connection, my colleagues observe that had the respondent here been an employer (instead of a union) and the facts analogous, the Board would undoubtedly find that the settlement was undermined and should be set aside. I agree. What distinguishes the two situations, in my view, is the right of union officials and union members to communicate with each other concerning the union's obligation to represent employees who choose not to help defray the substantial costs of representing members of the unit. See *Austin*, supra, 418 U.S. at 277 (Section 7's guarantee of employee rights gives "union freedom of speech" a "primary source of protection");[3] *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542 (1972) (Section 7 guarantee of employees' right to organize or assist unions "includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves"). Section 7's protection of communications between a union and its members requires us to apply a different standard in determining whether a union communication, such as at issue here, is improper under the Act, or grounds for setting aside the settlement.

While Darrough's references to Adelson's claim for back pay fell close to the line, he did not threaten not to represent her or other nonmembers in the future. In fact, his observation that Adelson "certainly demands everything that dues paying members struggle for" indicates that Adelson's rights would continue to be respected, if not gladly. Moreover, as the judge noted, Darrough's column was not contemporaneous with the initial posting of the notice; it was mailed rather than posted next to the notice; and it was mailed only to union members.[4]

Finally, unlike in other cases where the Board has sustained the setting aside of a settlement agreement, the Union has complied with both the posting and the backpay requirements of the settlement here. See, e.g., *Littler Diecasting*, 334 NLRB 707, 710–711 (2001); *Deister Concentrator Co.*, 253 NLRB 358, 359 (1980).[5] From

[1] See, e.g., *Communications Workers of America v. Beck*, 487 U.S. 735, 749–750 (1988). As the *Beck* Court explained, Congress authorized union-security clauses because it "recognized the validity of unions' concerns about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union." Id. at 749, quoting *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954) (emphasis omitted).

[2] "Labor disputes are ordinarily heated affairs. . . . [R]epresentational campaigns are frequently characterized by bitter and extreme charges, countercharges . . . vituperations, [and] personal accusations." 418 U.S. at 272, citing *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966).

[3] In *Austin*, supra, the Court found that a union newsletter's use of "loose language [to] demonstrate the union's strong disagreement with the views of those workers who oppose unionization . . . even in the most pejorative of terms, is protected under federal labor law." 418 U.S. at 284.

[4] Contrast *Bingham-Williamette Co*., 199 NLRB 1280, 1281–1282 (1972) (settlement properly revoked where the sole agreed remedy had been notice posting, and employer simultaneously posted a separate commentary next to the required notice suggesting that posting was a mere formality).

[5] My colleagues point out that the employers in *Littler* and *Deister* took remedial actions in addition to notice-posting that directly affected more employees than did the Union's payment of backpay to Adelson here. But Adelson was the only employee that the Union allegedly mistreated here, and the Union fully compensated her.

the perspective of administrative economy, there is little point in resuming this litigation.

For these reasons, I conclude that the settlement agreement at issue should not be set aside.[6]

Dated, Washington, D.C. December 31, 2003

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS

David Nixon and *Michael Werner, Esqs.*, for the General Counsel.

Terry D. Smith and *Larry D. Ehrlich, Esqs.*, of Wichita, Kansas, for the Respondent.

DECISION*

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Wichita, Kansas, on October 11, 2001. The General Counsel's initial complaint alleged that the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by discriminating against the Charging Party because she is not a member. The Respondent had not included her in a payout which settled a grievance the Respondent brought against the United States Postal Service. This case was adjusted pursuant to a non-Board settlement agreement and the complaint dismissed by the Regional Director.

At issue here is whether the Respondent's postsettlement acts constitute repudiation of the settlement agreement and were additionally violative of Section 8(b)(1)(A).

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the complaint should be dismissed because the General Counsel offered no evidence that it discriminated against the Charging Party or failed to comply with the settlement agreement.

On the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The United States Postal Service (USPS) provides postal services for the United States and operates various facilities throughout the United States, including a facility at 9450 East Corporate Hills Drive, Wichita, Kansas. The Board has jurisdiction over the USPS pursuant to Section 1209 of the PRA.

II. THE LABOR ORGANIZATION INVOLVED

American Postal Workers Union, Local 735 (the Respondent or the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

For some years, the Union has been the exclusive bargaining representative of a unit of the USPS employees at the East Corporate Hills Drive facility. On May 25, 2000,[1] Christine Pruitt, the Union's steward, filed a grievance alleging that Ricky Bryant, an employee in another craft, had been assigned work within the Union's bargaining unit jurisdiction. This matter was resolved at the second step with an agreement that unit employees who were on the "overtime desired" list would be compensated for the 105 hours that Bryant had done bargaining unit work. However, not all such unit employees received a payment.

Pruitt testified that she chose which unit employees would share in the payment, and that in order to give those chosen more money (specifically Alfred Norris and Debbie Holt), she excluded Teri Adelson, the Charging Party. She denied that Adelson was excluded because she was not a union member.

Denise Brown, the USPS manager who settled the grievance with Pruitt, testified that during their meeting Pruitt called someone and then reported that since it was a "class action" grievance, the Union could choose whomever it wished to compensate. Norris testified that Pruitt had told him she was only going to pay those who were union members, a statement he then relayed to Adelson's brother.

Adelson filed a charge alleging that she had been discriminated against because of her nonmembership in the Union, and, as noted above, the complaint was settled pursuant to a non-Board agreement which required the Union to post a notice and make an appropriate payment to Adelson. This settlement was finalized in April 2001.

The notice posted by the Union was in the form of a letter to all bargaining unit employees from Dave Darrough, the Union's president. It reads:

> The American Postal Workers Union Local 735 recognizes and observes the rights of all employees in the Unit.

In the May 2001 newsletter to members, Darrough reported concerning settlement of the of the grievance and the unfair labor practice:

> In this particular case, a large sum of money was involved in the award. In order to make the award worthwhile, it was decided to divide it between a number of the Bargaining Unit. In this case we asked that the award be divided between approximately 50% of the Bargaining Unit employees at Corporate Hills. Normally the Union will rotate awards so that everyone will eventually receive compensation. However, in particular case [sic.], non-member Teri Adelson was not one of 50% chosen. Since her brother was one who was selected to receive compensation, Ms. Adelson was passed over. Evi-

[6] Like my colleagues, since the case is being remanded for findings on the merits of both allegations in the consolidated complaint, I need not reach the issue of whether Darrough's column violated Sec. 8(b)(1)(A).

* Correction has been made according to an errata issued on January 10, 2002.

[1] All dates are in 2000, unless otherwise indicated.

> dently this didn't set well with Ms. Adelson. Although she doesn't pay dues and probably never will, she certainly demands everything that dues paying members struggle for. Ms. Adelson never called the Union or made an inquiry as to why she wasn't included. She simply filed a complaint with the National Labor Relations Board alleging she had been discriminated against by the Local Union. At some point, even when you are right, litigation costs more to defend than it is worth. On the advice of our attorneys, we decided to avoid further litigation that promised to run into the thousands. I settled her complaint by paying her the amount those who received the award settlement were paid. I report this to the membership because it is true. I was cautioned that if I reported this I should look over my shoulder and not be surprised if another complaint isn't filed against me. I am never surprised at the steps a SCAB, FREE LOADER or what ever you choose to call a person who refuses to pay their fair share and take a free ride on the dues of the dues paying membership. I tell you right now, I am proud of Chris Pruitt and stand behind and support her 100%. She never intentionally did anything wrong, and I don't believe she ever will.

Based on this newsletter, Adelson filed the second charge in this matter and the Regional Director revoked his order dismissing the first complaint and issued the consolidated complaint herein alleging that the Union had violated Section 8(b)(1)(A) by the actions of Pruitt and Darrough.

B. Analysis and Concluding Findings

There is little question that Pruitt's decision to exclude some members of the bargaining unit from settlement of the "craft crossing" grievance was discriminatory. Basically, the grievance was settled by awarding to unit employees hours that Bryant had done bargaining unit work. And it was determined, presumably by Pruitt, that those hours would have been worked by unit employees who had asked for overtime. Thus, those on the "overtime desired" list were to be compensated; but to compensate them all would reduce the amount each would receive.

Thus, Pruitt testified that Holt asked if the settlement had "gotten her up to the $300.00, was there not somebody else to eliminate? I evaluated what was left. I said, sure, we can cut one more person. I eliminated Teri (Adelson)." Pruitt excluded Adelson, who otherwise would have been entitled to participate in the grievance settlement, "solely so that others could get more money." By her actions, Pruitt clearly failed in her duty to represent fairly all unit employees.[2]

However, the complaint alleging this was withdrawn based on a settlement entered into between the Respondent and the Adelson and accepted by the Regional Director. The Union agreed to post the non-Board notice and pay Adelson the amount she would have received absent the discrimination against her. There is no contention that the notice was not posted nor that Adelson did not receive the money.

[2] Adelson was, however, included for pay in another grievance filed by Pruitt on October 5, 2000—a week before Adelson filed the first charge herein.

It has long been the Board's policy that a settlement agreement will be set aside only if its provisions are breached or the respondent commits postsettlement unfair labor practices. E.g., *YMCA of the Pike Peak Region, Inc. v. NLRB*, 914 F.2d 1442 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991), enfg. 291 NLRB 998 (1988).

The General Counsel argues that the Union's newsletter was such a postsettlement unfair labor practice, or in the alternative, was sufficiently offensive to require setting aside the settlement agreement, citing *Bangor Plastics, Inc.*, 156 NLRB 1165 (1966), and others. The Respondent argues that the article contains no threat and therefore under Section 8(c) cannot be held to have been unlawful. Though I agree that Section 8(c) protects speech by the Union's president to its members, where such speech "contains no threat of reprisal or force or promise of benefit" such has no bearing on whether the settlement of a complaint should be set aside. Section 8(c) states only that speech which does not contain a threat or promise of benefit cannot be used as evidence of unfair labor practices.

I conclude that neither the settlement agreement nor the Act prohibited the Union from telling members of its position. Unquestionably, statements by a union official that he would not represent "scabs" are violative of Section 8(b)(1)(A). *Letter Carriers, Branch 47 (Postal Service)*, 327 NLRB 529 (1999). But the comments by Darrough in the newsletter do not rise to this level. He stated his opinion, in opprobrious language to be sure, and his fact assertions concerning the grievance matter are inconsistent with Pruitt's testimony. But such, absent some kind of threat that the Union would refuse to represent Adelson or any other nonmember, does not make his comments unlawful. I conclude Section 8(c) protects the statements made by Darrough in the newsletter and the Union did not commit a postsettlement unfair labor practice as alleged.

In a long line of cases, the Board, generally with court approval, has held a notice which tends to minimize the respondent's culpability, and therefore the effect of the Board's notice, posted along side the settlement notice, is sufficient to set aside a settlement. As the Board stated in *Diester Concentrator Co.*, 253 NLRB 358, 359 (1980), charged parties "risk having a settlement agreement set aside if they post their own comments alongside an official Board notice." However, the Board has also held that the determination of whether a settlement agreement should be set aside in such a situation is not to be based on the application of mechanical or a priori rules.

Thus, in cases where the respondent posted a contemporaneous notice stating, in effect, it had done nothing wrong and settled only to avoid litigation expenses, where it complied with other "significant" remedial provisions, the Board reinstated the agreement. *Deister*, supra; *Steelworkers Local 3489 (Stran Steel Corp.)*, 263 NLRB 934 (1982); *Litter Diecasting Corp.*, 334 NLRB 707 (2001).

In other cases, cited by the General Counsel, the Board concluded that posting a contemporaneous notice by the respondent justified setting aside a settlement agreement. However, in those cases the Board's notice was the only remedial action, *Bingham-Williamette Co.*, 199 NLRB 1280 (1972), *Bangor*

Plastics, Inc., supra; or the respondent's notice contained misstatements. *Gould, Inc.*, 260 NLRB 54 (1982).

Here, in addition to the notice, the Respondent made a monetary payment which, I conclude, was a significant part of the remedy. Though a more formal notice would have been standard had the case been litigated and the unfair labor practice found, the statement that "American Postal Workers Union Local 735 recognizes and observes the rights of all employees in the Unit," was acceptable to the Regional Director and the Charging Party. The notice along with the payment to Adelson fully remedied the allegations.

Further, unlike the cases cited by the General Counsel, the Union's newsletter was not a notice posted next to the settlement notice. It was a report to members which would not necessarily have even been read by nonmembers in the bargaining unit. Darrough's report was more akin to a report to stockholders than a notice to employees. Such tends to lessen any effect it may have had in undermining the posted notice.

As distasteful as it may be to some, the Act requires that a union which represents employees must represent them all—fairly and without regard to whether a particular bargaining unit member belongs to the union. Dues paying membership cannot be a factor in the union's representation of bargaining unit employees. This was affirmed by Darrough in the notice to bargaining unit members. It was not retracted in his newsletter article, even though he made disparaging comments about Adelson and his recitation of the grievance settlement seems at odds with Pruitt's testimony.

Accordingly, I conclude that the General Counsel did not establish a postsettlement unfair labor practice or other grounds for setting aside the parties' settlement agreement. I, therefore, conclude that the complaint herein should be dismissed and enter the following recommended[3]

ORDER

The consolidated complaint is dismissed in its entirety.

Dated, San Francisco, California, December 7, 2001

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.